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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. IRENE V. ARIAS, Defendant and Appellant.	F043873 (Super. Ct. No. F02902861-4) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Fresno County. Alan Simpson, Judge.

Paul V. Carroll, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Kathleen A. McKenna and Robert P. Whitlock, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Irene Arias entered a plea of guilty to one count of embezzlement, a violation of Penal Code[1] section 503, and one count of grand theft of personal property, a violation of section 487, subdivision (a). She also admitted that (1) the offenses were related crimes having material elements of fraud and embezzlement, which involved a pattern of related felony conduct and involved the taking of more than $500,000 within the meaning of section 186.11, subdivision (a); and (2) she took property having a value in excess of $1,000,000 within the meaning of section 12022.6, subdivision (a)(3). The crimes occurred while Arias was employed as a bookkeeper for Semper Trucking. Arias wrote checks to herself, her son-in-law and her personal business in an amount exceeding $1,000,000.

At sentencing, Arias asked for probation but the court sentenced her to the upper term of three years for the embezzlement conviction plus three years for each of the two enhancements. For the grand theft conviction, the court sentenced Arias to a concurrent two-year term, staying the enhancements.

DISCUSSION

I

Appellant contends that the trial court improperly used the total dollar amount of the thefts to justify imposition of both the section 12022.6, subdivision (a)(3) enhancement and the aggravated term for the embezzlement conviction and also impermissibly used an element of that offense as an aggravating factor. She also claims she was denied effective assistance of counsel when her trial lawyer failed to object to the errors.

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[1] All further references are to the Penal Code.

A.

At sentencing, the trial court acknowledged appellant's contention that she stole from her employer in order to help her daughter with mental health and drug problems. However, the court rejected appellant's bid for probation, stating that:

> "[E]verybody doesn't take a million dollars. And if [the court] were to place [appellant] on probation, any time anybody had a case where they had stolen or taken less than 1.1 million dollars, if they didn't have any or much of a criminal record they would expect that they should be placed on probation. And, that's not fair to the victims in the case who are trying to run a business that was nearly bankrupted because of your actions."

The court then found "that the crime involved an actual taking and damage of great monetary value and that [appellant] took advantage of a position of trust or confidence having worked at that company for many, many years and during the latter portion of some of those years having taken this kind of money." The court cited to the Rules of Court, rule 4.421(a)(9), which lists as an aggravating factor that the "crime involved an attempted or actual taking or damage of great monetary value." Reiterating that appellant "took advantage of a position of trust or confidence" to commit this offense which is substantial in nature, the court concluded that, "when weighing the aggravating circumstances against those factors that the Court could find in mitigation, the Court finds that, on balance, the aggravating circumstances preponderate."

The trial court thus used the large dollar amount of the theft as a rule 4.421(a)(9) aggravating factor to justify imposition of the upper term on the embezzlement conviction. Nonetheless, the court also imposed a three-year enhancement pursuant to section 12022.6, subdivision (a)(3) because appellant admitted that the amount she had taken exceeded $1,000,000. This dual use of the same sentencing factor -- the large amount of the theft -- was error. (§ 1170, subd. (b); Cal. Rules of Ct, rule 4.420(c); *People v. Forster* (1994) 29 Cal.App.4th 1746, 1758 [a sentencing court may not rely on the same fact to impose a sentence enhancement and to justify an upper term]; *People v.*

Prothro (1989) 215 Cal.App.3d 166, 171, fn. 1 [court's sentencing power is limited by the prohibition against the dual use of facts for aggravation and enhancement].)[2]

At sentencing the prosecutor argued that Semper was forced to near bankruptcy as a result of the theft and was not a company that "could sustain this kind of theft." Respondent now seizes upon this argument to attempt to distinguish the large amount of the loss -- the $1,000,000 -- from the impact of the loss upon the victim -- Semper was unable to sustain the loss and was pushed to the verge of bankruptcy -- and thereby creates two separate aggravating factors out of one. However, as we pointed out above, the trial court made no attempt to distinguish the large amount taken from the impact of the taking on the victim; instead, the court cited only one rule of court, No. 4.421(a)(9), to support its conclusion that its stated observations about the large amount of the loss and the impact on the victim constituted a single aggravating factor.

Moreover, even if we were to agree the two were severable factors, there was no record evidence that the impact of the theft on Semper was any greater than it would have been for any other victim of a theft of such a large amount of money. There was no victim impact statement or other evidence in the probation report to support the prosecutor's representation that Semper was almost forced to bankruptcy. (See Cal. Rules of Ct., rule 4.420(b) [circumstances in aggravation shall be established by a preponderance of the evidence]; *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1775 [when an appellant claims the trial court made an impermissible dual use of a fact as both an enhancement and an aggravating factor, reviewing court looks at whether the trial court could have based the aggravating factor *on evidence* other than that which gave rise to the enhancement; trial court's sentencing scheme and its statement of reasons must be supported by available, appropriate, relevant evidence].)

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2 By definition, $1,000,000 is a "great monetary value." (Cal. Rules of Court, rule 4.421(a)(9).)

In addition, the trial court relied upon another purported but improper aggravating factor. A court may not aggravate a sentence based on an element of the crime. (Cal. Rules of Ct., rule 4.420(d) ["A fact that is an element of the crime shall not be used to impose the upper term"]; *People v. Wilks* (1978) 21 Cal.3d 460, 470 [a circumstance which is an element of the substantive offense cannot be used as a factor in aggravation]; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1261 [element of crime may not be used to aggravate term].) "A sentencing factor is an element of the offense if the crime as defined by statute cannot be accomplished without performance of the acts which constitute such factor. [Citations.]" (*People v. Clark* (1992) 12 Cal.App.4th 663, 666.)

Respondent for all intents and purposes concedes that appellant's abuse of a position of confidence and trust, one of the two factors identified by the trial court as supporting the imposition of the upper term, was an element of the crime of embezzlement. (See § 503 [embezzlement defined as "fraudulent appropriation of property by a person to whom it has been entrusted"]; *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1845 [embezzlement involves breach of trust relationship and confidence of victim].)

B.

Both parties agree that appellant's failure to object to the two errors waived the mistakes for purposes of appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 353 [failure to object to perceived errors or omissions at sentencing constitutes waiver].) Therefore, of necessity, appellant relies upon alleged ineffective assistance of counsel, which requires that appellant establish (1) her counsel's deficient performance under an objective standard of reasonableness given prevailing professional norms and (2) her prejudice, i.e., that it is reasonably probable, but for counsel's failings, the result would have been more favorable to appellant. (*People v. Riel* (2000) 22 Cal.4th 1153, 1175.)

We agree that there could not have been any rational tactical reason for not objecting to the court's improper dual use of the large amount of the loss in this case.

This dual use was clearly wrong and, because the trial court also improperly relied upon an element of the crime as the other aggravating factor, the imposition of the upper term is not legally supported by any valid aggravating factor.[3] (See Cal. Rules of Ct., rule 4.420(a) & (b); *People v. Scott, supra,* 9 Cal.4th at p. 350 [court may impose the upper term of imprisonment only where the balance of aggravating and mitigating factors cited in support of that choice weighs against imposition of the middle term].)

Respondent argues that appellant's trial counsel could have decided not to object because a third aggravating factor was identified in the probation report -- that the crime involved planning and sophistication. However, we are not satisfied that appellant's trial counsel would have declined to object to the use of the two legally improper factors simply because a third was mentioned in the probation officer's report, particularly when the third factor was disputed by appellant. In any event, the trial court did not mention the third factor at all and did not identify it as one of the aggravating factors weighed in its sentencing choice. (See Cal. Rules of Ct., rule 4.420(e) [law requires the trial court to state "the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected"].) While we must presume the trial court knew about the potential third factor, given its presence in the probation report and the argument at sentencing (*People v. Kelley* (1997) 52 Cal.App.4th 568, 582), we will not presume the trial court found that third factor to be a valid aggravating factor or that it did or would have used it to justify imposition of the upper term in the absence of the other two invalid factors.

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[3] On our own motion, we take judicial notice of the affidavit of appellant's trial counsel, filed in support of her petition for writ of habeas corpus. (Evid. Code, § 452, subd. (d).) The affidavit states that counsel's failure to object to the improper dual use of a single fact was not based on tactical decisions but was simply a result of counsel's oversight.

We also agree that, because we have found improper the trial court's use of both identified aggravating factors, appellant has shown that it is reasonably probable, but for counsel's failings, that the result at sentencing would have been more favorable to her. Given the rule that a trial court may impose the upper term only where the circumstances in aggravation outweigh the circumstances in mitigation, we cannot say with reasonable assurance that the trial court would have imposed the upper term even if it did not have the other two identified but invalid aggravating factors available.

II.

Appellant contends that the trial court should have stayed, pursuant to section 654, the term imposed on the second count. Respondent concedes the error.

Both the embezzlement offense and the grand theft offense arose from the same set of operable facts and constituted an indivisible transaction with a single intent and objective. (*People v. Perez* (1979) 23 Cal.3d 545, 551; *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) The sentence on the second count should have been stayed. (*People v. Pearson* (1986) 42 Cal.3d 351, 359-361.)

III.

Appellant alternatively challenges the imposition of the upper term based upon *Blakely v. Washington* (2004) 542 U.S. ___[124 S.Ct. 2531]. Because we will remand for resentencing, we need not address this contention.

DISPOSITION

The judgment is reversed and the matter is remanded for resentencing only.

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Dibiaso, Acting P.J.

WE CONCUR:

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Levy, J.

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Gomes, J.